

TITLE XXIII

CLAIMS FOR LITIGATION AND ADMINISTRATIVE COSTS

RULE 230. GENERAL

(a) Applicability: The Rules of this Title XXIII set forth the special provisions which apply to claims for reasonable litigation and administrative costs authorized by Code Section 7430. Except as otherwise provided in this Title, the other Rules of Practice and Procedure of the Court, to the extent pertinent, are applicable to such claims for reasonable litigation and administrative costs. See Title XXVI for Rules relating to separate actions for administrative costs, authorized by Code Section 7430(f)(2).

¹**(b) Definitions:** As used in the Rules in this Title--

(1) "Reasonable litigation costs" include the items described in Code Section 7430(c)(1).

(2) A "deficiency action" is an action to redetermine a deficiency determined by the Commissioner in income, gift, or estate tax or in the taxes under Code Chapter 41, 42, 43, or 44 (relating to the excise taxes on certain organizations and persons dealing with them), or in the tax under Code Chapter 45 (relating to the windfall profit tax), or in any other taxes which are the subject of a notice of deficiency by the Commissioner.

(3) A "liability action" is an action to redetermine fiduciary or transferee liability determined by the Commissioner.

(4) A "partnership action" is an action for readjustment of partnership items under Code Section 6226 or adjustment of partnership items under Code Section 6228.

(5) A "declaratory judgment action" is an action for declaratory judgment relating to the qualification of retirement plans, the status of certain governmental obligations, and the initial or continuing qualification of certain exempt organizations under Code Section 7428 or 7476.

(6) In the case of a partnership action, the term "party" includes the partner who filed the petition, the tax matters partner, and each person who satisfies the requirements of Code Section 6226(c) and (d) or 6228(a)(4). See Rule 247(a).

(7) "Attorney's fees" include fees paid or incurred for the services of an individual (whether or not an attorney) who is authorized to practice before the Court or before the Internal Revenue Service. For the procedure for admission to practice before the Court, see Rule 200.

(8) "Reasonable administrative costs" means the items described in Code Section 7430(c)(2).

(9) "Administrative proceeding" means any procedure or other action before the Internal Revenue Service.

(10) "Court proceeding" means the deficiency, liability, partnership, or declaratory judgment action brought in this Court and in which the claim for reasonable litigation costs or reasonable administrative costs is made.

¹The amendments are effective as to claims for litigation or administrative costs filed with respect to proceedings commenced after July 30, 1996.

RULE 231. CLAIMS FOR LITIGATION AND ADMINISTRATIVE COSTS

(a) Time and Manner of Claim: (1) *Agreed Cases:* Where the parties have reached a settlement which disposes of all issues in the case including litigation and administrative costs, an award of reasonable litigation and administrative costs, if any, shall be included in the stipulated decision submitted by the parties for entry by the Court.

(2) *Unagreed Cases:* Where a party has substantially prevailed and wishes to claim reasonable litigation or administrative costs, and there is no agreement as to that party's entitlement to such costs, a claim shall be made by motion filed--

(A) Within 30 days after the service of a written opinion determining the issues in the case;

(B) Within 30 days after the service of the pages of the transcript that contain findings of fact or opinion stated orally pursuant to Rule 152 (or a written summary thereof); or

(C) After the parties have settled all issues in the case other than litigation and administrative costs. See paragraphs (b)(3) and (c) of this Rule regarding the filing of a stipulation of settlement with the motion in such cases.

¹**(b) Content of Motion:** A motion for an award of reasonable litigation or administrative costs shall be in writing and shall contain the following:

(1) A statement that the moving party is a party to a deficiency or liability action, a partnership action, or a declaratory judgment action, and that any such action was commenced after February 28, 1983;

(2) If the claim includes a claim for administrative costs, a statement that the administrative proceeding was commenced after November 10, 1988;

(3) A statement sufficient to demonstrate that the moving party has substantially prevailed with respect to either the amount in controversy or the most significant issue or set of issues presented either in the Court proceeding or, if the claim includes a claim for administrative costs, in the administrative proceeding, including a stipulation in the form prescribed by paragraph (c) of this Rule as to any settled issues;

(4) A statement that the moving party meets the net worth requirements, if applicable, of Section 2412(d)(2)(B) of title 28, United States Code (as in effect on October 22, 1986), which statement shall be supported by an affidavit executed by the moving party and not by counsel for the moving party;

(5) A statement that the moving party has exhausted the administrative remedies available to such party within the Internal Revenue Service;

(6) A statement that the moving party has not unreasonably protracted the Court proceeding and, if the claim includes a claim for administrative costs, the administrative proceeding;

(7) A statement of the specific litigation and administrative costs for which the moving party claims an award, supported by an affidavit in the form prescribed in paragraph (d) of this Rule;

(8) If the moving party requests a hearing on the motion, a statement of the reasons why the motion cannot be disposed of by the Court without a hearing (see Rule 232(a)(2) regarding the circumstances in which the Court will direct a hearing); and

(9) An appropriate prayer for relief.

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(c) Stipulation as to Settled Issues: If some or all of the issues in a case (other than litigation and administrative costs) have been settled by the parties, then a motion for an award of reasonable litigation or administrative costs shall be accompanied by a stipulation, signed by the parties or by their counsel, setting forth the terms of the settlement as to each such issue (including the amount of tax involved). A stipulation of settlement shall be binding upon the parties unless otherwise permitted by the Court or agreed upon by those parties.

(d) Affidavit in Support of Costs Claimed: A motion for an award of reasonable litigation or administrative costs shall be accompanied by a detailed affidavit by the moving party or counsel for the moving party which sets forth distinctly the nature and amount of each item of costs paid or incurred for which an award is claimed.

RULE 232. DISPOSITION OF CLAIMS FOR LITIGATION AND ADMINISTRATIVE COSTS¹

(a) General: A motion for reasonable litigation or administrative costs may be disposed of in one or more of the following ways, in the discretion of the Court:

(1) The Court may take action after the Commissioner's written response to the motion is filed. (See paragraph (b)).

(2) After the Commissioner's response is filed, the Court may direct that the moving party file a reply to the Commissioner's response. Additionally, the Court may direct a hearing, which will be held at a location that serves the convenience of the parties and the Court. A motion for reasonable litigation or administrative costs ordinarily will be disposed of without a hearing unless it is clear from the motion, the Commissioner's written response, and the moving party's reply that there is a bona fide factual dispute that cannot be resolved without an evidentiary hearing.

(b) Response by the Commissioner: The Commissioner shall file a written response within 60 days after service of the motion. The Commissioner's response shall contain the following:

(1) A clear and concise statement of each reason why the Commissioner alleges that the position of the Commissioner in the Court proceeding and, if the claim includes a claim for administrative costs, in the administrative proceeding, was substantially justified, and a statement of the facts on which the Commissioner relies to support each of such reasons;

(2) A statement whether the Commissioner agrees that the moving party has substantially prevailed with respect to either the amount in controversy or the most significant issue or set of issues presented either in the Court proceeding or, if the claim includes a claim for administrative costs, in the administrative proceeding;

(3) A statement whether the Commissioner agrees that the moving party meets the net worth requirements, if applicable, as provided by law;

(4) A statement whether the Commissioner agrees that the moving party has exhausted the administrative remedies available to such party within the Internal Revenue Service;

(5) A statement whether the Commissioner agrees that the moving party has not unreasonably protracted the Court proceeding and, if the claim includes a claim for administrative costs, the administrative proceeding;

(6) A statement whether the Commissioner agrees that the amounts of costs claimed are reasonable; and

(7) The basis for the Commissioner's disagreeing with any such allegations by the moving party.

If the Commissioner agrees with the moving party's request for a hearing, or if the Commissioner requests a hearing, then such response shall include a statement of the Commissioner's reasons why the motion cannot be disposed of without a hearing.

(c) Conference Required: After the date for filing Commissioner's written response and prior to the date for filing a reply, if one is required by the Court, counsel for the Commissioner and the moving party or counsel for the moving party shall confer and attempt to reach an agreement as to each of the allegations by the parties. The Court expects that, at such conference, the moving

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party or counsel for the moving party shall make available to counsel for the Commissioner substantially the same information relating to any claim for attorney's fees which, in the absence of an agreement, the moving party would be required to file with the Court pursuant to paragraph (d) of this Rule.

(d) Additional Affidavit: Where the Commissioner's response indicates that the Commissioner and the moving party are unable to agree as to the amount of attorney's fees which is reasonable, counsel for the moving party shall, within 30 days after service of the Commissioner's response, file an additional affidavit which shall include:

(1) A detailed summary of the time expended by each individual for whom fees are sought, including a description of the nature of the services performed during each period of time summarized. Each such individual is expected to maintain contemporaneous, complete, and standardized time records which accurately reflect the work done by such individual. Where the reasonableness of the hours claimed becomes an issue, counsel is expected to make such time records available for inspection by the Court or by counsel for the Commissioner upon request.

(2) The customary fee for the type of work involved. Counsel shall provide specific evidence of the prevailing community rate for the type of work involved as well as specific evidence of counsel's actual billing practice during the time period involved. Counsel may establish the prevailing community rate by affidavits of other counsel with similar qualifications reciting the precise fees they have received from clients in comparable cases, by evidence of recent fees awarded by the courts or through settlement to counsel of comparable reputation and experience performing similar work, or by reliable legal publications.

(3) A description of the fee arrangement with the client. If any part of the fee is payable only on condition that the Court award such fee, the description shall specifically so state.

(4) The preclusion of other employment by counsel, if any, due to acceptance of the case.

(5) Any time limitations imposed by the client or by the circumstances.

(6) Any other problems resulting from the acceptance of the case.

(7) The professional qualifications and experience of each individual for whom fees are sought.

(8) The nature and length of the professional relationship with the client.

(9) Awards in similar cases, if any.

(10) A statement whether there is a special factor, such as the limited availability of qualified attorneys for the case, to justify a rate in excess of \$110 per hour.

(11) Any other information counsel believes will assist the Court in evaluating counsel's claim, which may include, but shall not be limited to, information relating to the novelty and difficulty of the questions presented, the skill required to perform the legal services properly, and any efforts to settle the case.

Where there are several counsel of record, all of whom are members of or associated with the same firm, an affidavit filed by first counsel of record or that counsel's designee (see Rule 21(b)(2)) shall satisfy the requirements of this paragraph, and an affidavit by each counsel of record shall not be required.

(e) Burden of Proof: The moving party shall have the burden of proving that the moving party has substantially prevailed, that the moving party has exhausted the administrative remedies available to the moving party within the Internal Revenue Service, that the moving party has not unreasonably protracted the Court proceeding or, if the claim includes a claim for administrative costs, the administrative proceeding, that the moving party meets the net worth requirements, if

applicable, as provided by law, that the amount of costs claimed is reasonable, and that the moving party has substantially prevailed with respect to either the amount in controversy or the most significant issue or set of issues presented either in the Court proceeding or, if the claim includes a claim for administrative costs, in the administrative proceeding; except that the moving party shall not be treated as the prevailing party if the Commissioner establishes that the position of the Commissioner was substantially justified. See Code Section 7430(c)(4)(B).

(f) Disposition: The Court's disposition of a motion for reasonable litigation or administrative costs shall be included in the decision entered in the case. Where the Court in its opinion states that the decision will be entered under Rule 155, or where the parties have settled all of the issues other than litigation and administrative costs, the Court will issue an order granting or denying the motion and determining the amount of reasonable litigation and administrative costs, if any, to be awarded. The parties, or either of them, shall thereafter submit a proposed decision including an award of any such costs, or a denial thereof, for entry by the Court.

RULE 233. MISCELLANEOUS¹

For provisions prohibiting the inclusion of a claim for reasonable litigation and administrative costs in the petition, see Rules 34(b) (petition in a deficiency or liability action), 211(b) (petition in a declaratory judgment action), and 241(c) (petition in a partnership action). For provisions regarding discovery, see Rule 70(a)(2). For provisions prohibiting the introduction of evidence regarding a claim for reasonable litigation or administrative costs at the trial of the case, see Rule 143(a).

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